No. 8973

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY, a Corporation, and ALEXANDER LEWIS,

Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

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PETITION FOR REHEARING

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

COMES NOW The appellant, WILLIAM I. PHILLIPS by his attorneys, and respectfully petitions the Honorable Court for a rehearing of the above entitled cause and for withdrawing, vacating, and a setting aside of decision, and the opinion of the Court in said cause filed February 14, 1939, and for an Order to Stay Mandate pending the further hearing, presentation, and decision in said cause.

Your petitioner herein shows unto your Honors that the Court misconceived and overlooked certain facts in the record and in rendering its decision, and that it would be

inequitable to permit the opinion and decision to stand as entered in the cause on the following grounds, to-wit:

I

The court overlooked and omitted to pass upon the question of the appellee appearing in the state court and by motion to quash, the Summons and Complaint thereby submitted to the Jurisdiction of the court and entered a general appearance. (Motion to Quash Tr. 19-20-21) (Minutes of the Court Tr. 29-30).

II

That the filing of authority to sign bond did not validate the act of attorney who had no authority in the first instance at all, when he proffered said purported bond, and it was illegal for him to sign any bond, and, of course, the same could not be amended. (Tr. 26).

III

That the filing of a sufficient bond *within the time to answer or plead* is a condition precedent to removal, neither the signing by the attorney nor the agent of the Surety Company was properly or legally done. (Minutes of the Court Tr. 42). (Power of Attorney Tr. 43, 44, 45, 46).

IV

The court overlooked the fact that the state court evidently had passed upon its own jurisdiction when it transferred the case to the federal district court, and it was improper to raise the same matter in the federal court by relying on the former motion filed in the state court, as it

was the duty of the appellees after the removal, to plead, demur, or answer within 30 days after the removal.

V

And the court erred in holding that the federal district court should overrule the holding of the state court on the question of state jurisdiction, since service was sufficient in the state court in the first instance, and the federal court erred when it refused to remand if the service was not deemed sufficient in its court.

VI

The court overlooked and misconceived that the appellees had been and were doing business in the State of Idaho at the time of service, both at the time of service in the state court, and at the time of service in the federal court. Tr. 103 (Patents) Royalty Checks Tr. 111-113; Affidavits Tr. 34-35; Affidavits Tr. 37-38; Affidavit Tr. 77-78-79; Affidavit Tr. 105; "United States Marshal's Return" Tr. 85; and Affidavit of William I. Phillips Tr. 86-87-88.

VII

The court erred in holding, inferentially, that Alexander Lewis did business in behalf of Huron Holding Company (a foreign corporation) as there is no evidence in the record that it had complied with the laws of the State of Idaho, but to the contrary, (and there is a conflict in the record on this point.) Therefore, neither the Huron Holding Company nor Alexander Lewis, for it,

could have done any business legally within the state. Tr. (Complaint) 3 Tr. affidavit 120-123.

VIII

And misconceived in holding that if the case were reversed, it would be necessary to obtain service again in the state court. The service in the state court was sufficient under the state law to give jurisdiction, and no further service would be required if reversal and remand be granted.

IX

And it was error to hold "there was nothing to show that service might soon be had or that the situation would change". (This, however, was not within the perview of the court's prerogative,) and no evidence was introduced to that effect.

X

The court overlooked the fact that to remove the case from the state court to the federal court and then dismiss at appellant's cost, would be error and, "cause appellant to go on a fool's errand."

XI

And the court overlooked and failed to pass upon the question of the right of appellees to appear and argue against remanding, after the federal district court had decided in their favor, since they were no longer interested.

POINTS AND AUTHORITIES

The right of removal is purely statutory, and one seeking the benefits of the statute must comply with its essential provisions.

Section 29, J. C. Statutes S. 1011.
Anderson vs. Troller, 32 Fed. 2nd 389.
Lambert Run Coal Co. vs. Baltimore & O. R. Co. 258 U. S. 377.
Elbs vs. Yates Am. Mrch. Co., 23 Fed. 2nd 368.
Thomas vs. Delta L. & W. Co., 258 Fed. 738.
Hoyte vs. Ogden Cement Co., 185 Fed. 88.
Al G. Barnes, 39 Idaho 807.
Cleveland C. C. R. Y. vs. Rudy, 89 NE 952.
Pickwick Stages vs. Board of Trustees of C. of El Paso, D. R. 208 Pac. 961.
Ransburg vs. Hackney Manu. Co., 164 Pac. 793.
Mahr vs. U. P. Power Co., 140 Fed. 921, Affirmed by 9th CCA 170 Fed. 699.
Jenkins vs. York Cliff's Implement Co., 110 Fed. 807.
Taylor vs. Taylor 182 So. 2nd 240.
Hudson Nav. Co. vs. Murray 233 Fed. 466.
Crawford vs. Foster, 84 Fed. 939.
Hammond et al vs. District Court of N. Mex., 228 Pac. 758.
Fowler vs. Continental Cas. Co., 124 Pac. 479.
Dailey et al vs. Foster, 17 N. Mex., 377, 128 Pac. 71.
Re-employers Reinsurance Corp., 82 Fed. 2nd 373.

If the state court had properly acquired jurisdiction in a method authorized by (state law), and not repugnant to the Federal Constitution or laws or natural justice, the federal court on removal will recognize such jurisdiction, and the process by which it was obtained.

4 Blatch. 120 Fed. Case 11261.
Hume vs. Pittsburgh C. & St. Light R. Co., 31 Fed. C #6865.
State vs. Bradley, 26 Fed. 289.
Sullivan vs. Missouri, P. Lines, 1 Fed. Supp. 803.
Gassman vs. Jarvis 100 Fed. 146.
Peters vs. Equitable Life Asso. of U. S., 149 Fed. 290.
Wena Lumber Co., vs. Continental Lum. Co., 270 Fed. 795.

After removal from the state court to the federal court, and the filing of the record, it was the appellees duty to plead, demur, or answer within 30 days.

Eggers vs. Julian Patrol Co., 22 Fed. 2nd 714 (29 J. C. 28 U. S. CA 72).
Caine vs. Commercial Pub. Co., 232 U. S. 124.

Neither the Manufacturers Trust, appellee, nor Alexander Lewis, trustee, or agent for Manufacturers Trust Co., nor Huron Holding Company, nor Alexander Lewis as trustee for Huron Holding Company, was authorized to do business in the State of Idaho, and that Manufacturers Trust Company and Huron Holding Company were one and the same.

R. C. L. Volume 21, S. 94.
Flynn vs. Gillin et al 10 So. Eastern (2nd) 923.
Donaldson vs. Thousands Springs Co. 29 Idaho, 735-162 Pac. 334.
Ojust Mining Co. vs. Manufacturers Trust Co., 82 Fed. 2nd 74.

Service on a foreign non-complying corporation upon a designated state official is prima facia sufficient.

Knapp S. N. Coal vs. Nat. Mut. F. Co., 30 Fed. 607.

Ehrman vs. Tetonia Insurance Co., 1 Fed. 471.

Walsh vs. Atlantic Coast R. R. Co., 256 Fed. 47.

McCullough vs. United Grocers Corp., 247 Fed. 880.

Indus. Research Corp. vs. Gen. Mo. Corp. 29 Fed. (2nd) 623.

Postal Telegram Cable Co., vs. Thornton 154 So. Western 1100.

The United States District Court erred in rendering a judgment of dismissal, with costs against appellant.

Swan Land & Cattle Co., vs. Frank 148 U. S. 324, 37 L-ed 580.

Wright vs. Missouri Pac. R. R. Co. et al, 98 Fed. (2nd) 34 (1938 case).

General Savings & Loan Soc. vs. Dormitzer (CCA 9C) 116 Fed. 471.

Forest vs. So. R. R. Co. 20 Fed. Supp. 851.

Appellees had no right to contest the motion to remand in the last instance.

Re-employers Reinsurance Corp., 82 Fed. (2nd) 373, 299 U. S. 375.

Appearance by special motion to quash, both summons and the complaint, is a general appearance.

Seager vs. Maney, 13 Fed. Supp. 617.
Elliot & Heeley vs. Worth, 34 Idaho 797.
Withers vs. Starce, 22 Fed. Supp. 773.
Picker vs. U. S. Cigar Store Co. of America, 6 Fed. Supp. 316.

ARGUMENTS

Upon the hearing of this cause in this Honorable Court counsel for plaintiff among other errors assigned, argued and maintained that the defendant in its so called Motion to Quash filed in the state court thereby entered a general appearance in the action. This question was disposed of by this court in its opinion in the following language,

> "Appellee did not enter a general appearance in the state court by filing therein in the motion to quash service (Orchard Co. v. C. C. Taft Co., 34 Ida. 458, 467, 202 Pac. 1062; 1 Ida. Code Ann. #12-504; Kline v. Shoup, 35 Ida. 527, 531, 207, Pac. 584)."

This part of the argument is applicable particularly under assignments No. One and Eleven, which in effect go to the same point. And we respectfully call the court's attention to the fact that the above cases, in our opinion, are not in point in this case. The special appearances mentioned in the above Idaho cases are entirely different from the one now before the court. They did not contain any of the defects or allegations which are contained in the so called special appearance in this case. The Supreme Court of Idaho in a later case Pittenger vs. Al G. Barnes Circus, 39 Idaho 807 announced the rule in this state to be that any appearance for any purpose except to object to the jurisdiction of the court over the defendant is a general appearance and this last case the courts find on page 812.

> "The rule to be observed by a defendant relying upon a special appearance to attack the jurisdiction of the court is well stated in Lowe v. Stringham, 14

Wis. 225, where the court said: "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.' "

For convenience of the court we hereby set forth in full the motion to quash. Our objections to the same follow.

MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT.

Filed in the State Court
February 27, 1937

COMES NOW, the defendant, MANUFACTURERS TRUST COMPANY, a corporation, by its Attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; *that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.*

II.

That service of summons and complaint in this case has never been made upon the said defendant, Manufacturers Trust Company, by personal service *or otherwise,* but that on or about the 8th day of February, 1937, the plaintiff caused a copy of the said summons and complaint in this case to be served upon

Steven Utter, Auditor and Recorder of Ada County, State of Idaho, at his office in the court house in Boise, Idaho. That the said Auditor and Recorder above named was not on the 8th day of February, 1937, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant Manufacturers Trust Company, was not on the said 8th day of February, 1937, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Stephen Utter, as Auditor and Recorder of Ada County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

III.

That this Honorable Court, therefore, does not have jurisdiction of the defendant corporation, the Manufacturers Trust Company.

WHEREFORE, Hawley & Worthwine respectfully move that the purported summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 27th day of February, 1937.

Hawley & Worthwine,
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendant
Manufacturers Trust Company,
a corporation,
appearing specially.

Duly verified

The caption to the above motion is as follows: "Motion to quash service of summons and complaint." This caption does not determine the character of the motion and is not to be considered in passing upon the same.

In Cleveland C. C. R. Y. vs. Rudy 89 N. E. p. 952 the courts say:

> "It is also the settled rule that the court will determine the character of the pleading whether it is an answer or counter claim not by what the pleader calls it but by the facts which it contains and the character of relief sought."

In Pickwick Stages vs. Board of Trustees of City of El Paso De Robles, 208 Pac. p. 961 the courts say:

> "The Court was in error in holding that the pleading filed by the defendant was a cross-complaint. It is true that it is so denominated in the introduction and by endorsement thereon but it is thoroughly established that the designation given by a party to his pleading does not determine its character."

In the motion to quash we find the following:

> "Comes now the defendant the Manufacturers Trust Company, a corporation, by its attorneys, Hawley and Worthwine, appearing specially for the sole purpose of quashing the purported service and jurisdiction of the court under said attempted service and not general or for any other purpose whatsoever."

From the reading of this paragraph it is difficult to say what service they desired to quash. It does not say to quash the service of the summons or the service of the complaint or the service of any other paper in the case,

but they ask *to quash the jurisdiction of the court.* Do they mean the jurisdiction over the person of the defendant or the subject matter of the action. That is also a matter of conjecture. In paragraphs two and three of said motion they admit that a certain service of the summons and complaint upon the defendant was made in a certain manner. They also state in the motion that at the time of the service they were not doing business or had not been doing business at the time of said service. There is no statement in said motion where they directly request the court to quash the service of the summons or complaint served upon it in this action.

The only relief sought in this motion is as follows:

> "WHEREFORE, Hawley and Worthwine respectfully move that the purported summons and complaint on the defendant and Manufacturers Trust Company, a corporation, be quashed."

If the court had granted to the defendant the relief which it asked for and had entered its order quashing the summons and the complaint to which defendants could not have objected there is no question but what this act would have called for the exercise of the general jurisdiction of the court and the appearance of the defendant would therefore be a general appearance.

It is of no consequence that the court did not grant this particular relief to the defendant, and it is not by an act of the court that jurisdiction is obtained over the person of the defendant but it is by the act of the defendant requesting some relief beyond and outside of the one ques-

tion of jurisdiction over the person by failure to make proper service upon said defendant. And, of course, the question of service over a defendant is waived if in any manner under the law it makes a general appearance.

If the court had granted the relief asked by the defendant and had entered an order quashing plaintiff's summons and complaint it would have the same effect exactly as if the court had sustained a demurrer to plaintiff's complaint. In order to quash the summons and complaint the court would have to take general jurisdiction of the case and examine the said summons and complaint and see whether or not any legal reason existed for quashing the same.

Under the great weight of authority, a defendant who appears in court to object to the jurisdiction over his person must confine himself to that issue and if he should take any part in subsequent proceedings it will be deemed a general appearance. On page 135 of the transcript we find the following:

> "Be it remembered that on the 13th day of June, 1938, came on to be heard, the plaintiff's motion heretofore filed on the 11th day of June, 1938, to remand the said cause to the District Court of the Third District of the State of Idaho, in and for Ada County, from which it was removed, and for the reasons specified in the motion the Court hearing argument of the plaintiff, *and also allowed defendant's attorney to present argument in opposition thereto, to which plaintiff objected.*"

From the above statement in the record it appears that the defendant's attorney in court presented an argument

against the remanding of this action to the state court. By so doing we claim that it constituted a general appearance in this action. This appearance and argument by the defendant was in no wise related to whether or not proper service of summons had been made upon the defendant. Whether or not the argument of the defendant's attorney on this question had any influence upon the court in his decision to dismiss the action instead of remanding the same, we have no means of knowing, but we do contend that said defendant's attorney entered a general appearance by taking part in the argument.

We believe the position to be sustained by the following cases:

In Rensberg vs. Hackney Mfg. Co., 164 Pac. 793 the Courts say:

> "If a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person he must specially appear for that purpose only. And must keep out of court for all other purposes except to make that objection."

Mahr vs. Union Pacific Power Co., 140 Fed. 921, Affirmed by Ninth Circuit CCA 170 Fed. 699.

Jenkins vs. Taylor Imp. Co., 110 Fed. 807.

In Taylor vs. Taylor 182 So. (2nd) on page 240 the courts say:

> "If, however, the defendant does take some step in the proceedings which admits in law to a submission to the court's jurisdiction, the fact that the defendant insists that he never so intended or that he does not

admit the jurisdiction of the court over his person or that he only appears specially and not generally, is not sufficient to preclude the court from considering and holding that the defendant has entered a general appearance in contemplation of law whatever he may choose to denominate his act." (citing cases)

Hudson Navi Co. vs. Murray, 233 Fed. 466.

Crawford vs. Foster 84 Fed. 939, 28 CCA 576.

The Courts, in an unbroken line of decisions, say generally that any action on the part of a defendant except to object to the jurisdiction over his person, which recognized the case, as in court, amounts to a general appearance.

Hammond et al vs. Dist. Court of N. Mex. 228 Pac. 758.

Fowler vs. Continental Casualty Co., 17 N. Mex. 188, 124 Pacific, 479.

Dailey et al vs. Foster 17 N. Mex. 377, 128 Pac. 71.

Then again, as so pointedly said in re-Employers Reinsurance Corporation 82 Fed. (2nd) 373,

"Furthermore, having prevailed in its motion to quash the service defendant was no longer before the court and was without standing to object to the remanding of the case."

We contend that the state court had properly acquired jurisdiction, and the correct proceeding in such case is clearly set out in the case of Wena Lumber Co., vs. Continental Lumber Co. wherein it is said, notice of intention to remove is the first step in the proceeding, and pleading,

in some form is the last step. The requirement to plead may not be mandatory or jurisdictional in the sense that it might be waived by the parties or extended by the court, *but it is an essential step necessary to be taken by the defendant* before the cause shall then proceed in the same manner as if it had originally commenced in the federal district court. The same was held in the case of Virginia Bridge & Iron Co. vs. U. S. Corporation, wherein it was said what must be done in order to remove a suit from the state to the federal court.

It proceeds as follows:

> "It shall then be the duty of the state court to accept said petition and bond, and proceed no further in said suit. Written notice of said petition and bond for removal shall be given the adverse parties prior to filing the same. The said copy being entered within thirty days as aforesaid in said district court of the U. S., the parties so removing the said cause *shall* within thirty days thereafter plead, answer or demur to the declaration or complaint in said cause, and the case shall then proceed in the same manner as if it had been originally commenced in said district court."

When the jurisdiction of the state court was challenged, it had a right to pass on same while cause pending in said court and evidently the court must have done so, since it would not, and could not have removed the case to the federal court, and it is not for the federal court to say it did not have that right, but if not satisfied with the case in the manner in which it was received it was its duty to remand. Hoyte vs. Ogden Portland Cement Co. 185 Fed. 889. Jurisdiction is conferred when defendant enters a

general appearance, such appearance being an appearance for some other purpose than for raising the objection of lack of jurisdiction over him. It must be assumed the court ruled on the motion, although silent on same so far as the record shows. Nevertheless, it must have passed upon the question, as it did upon the bond, although silent in that particular also, without approving same in so many words. It is very apparent that what the appellees sought in the case was to remove the case from the state court to the U. S. Federal Court and then dismiss same, but as said re-Employers Reinsurance Corporation, "*the federal court may not be used to perpetrate an injustice.*"

We do not believe there can be a scintilla of doubt but that defendants, appellees, were doing business—they owned the property and from the record, it appears the property was being operated also can not be disputed. Alexander Lewis, trustee, was dead and no conveyance by him was ever made (if it was necessary) and the Huron Holding Company, a foreign corporation, was never authorized to do business in Idaho and could not take title legally directly or indirectly, and being one and the same as the Manufacturers Trust Company, as held by this Honorable Court, can it then be truthfully said that appellee was not within the state and subject to the laws of the State of Idaho?

In the case of Industrial Research Corporation vs. General Moters Corporation, 29 Fed. (2nd) 623, the court while recognizing that mere fact that stock holders of two corporations are the same with one exercising controll

over the other through ownership of its stock or through identity of stock holders, does not make the agent of the other held—that fiction of corporation entity may be disregarded where one corporation is organized and controlled, and its affairs are so conducted that it is, in fact a mere instrumentality or adjunct of another corporation. Postal Telegram Cable Co. vs. Thornton 154 South Western 1100.

In conclusion, may we again revert to the question of the authority of the attorney to sign the bond for the purpose of removal? It is a law in most every state of the union and the rule in the courts of the State of Idaho that a practicing attorney shall not become surety in a suit in which he is engaged as an attorney at law, and that he can not act in the dual capacity of surety and attorney in the same action. In most of the jurisdictions, the legislature has emphatically declared and provided for the regulation of matters of this kind, and in the absence of such legislative regulation, it is governed by the rule of court.

Remembering, then, that the authority for the attorney in the case at bar to sign the bond or any bond for removal was not granted until several days after the time for appearance had expired, and that the paper proffered as a bond was not signed or executed by an agent having lawful authority, and no seal having been attached to the bond by the purported agent of the Surety Company and which authority of the Surety Company was not perfected until more than thirty days after the removal. It is then self-evident that at the time of removal from the state

court to the federal court, there was no bond upon which plaintiff could recover, so that clearly the case was improperly removed and it was the duty of the United States District Court to remand the case. And a judgment for costs in favor of the appellee was also error, since the United States Federal Court admitted it did not have jurisdiction, but arbitrarily dismissed the case. We think this was error. Picker vs. U. S. Cigar Store Co. of America.

It, therefore, would seem it becomes necessary to reverse the case and to remand the cause or else appellant is clearly forstalled in his obtaining action for relief, and as said in the case of Caine vs. Commercial Publishing Company in the opinion the purpose of the provisions which are amended to the prior law, it is contended "*Is to expedite trials and preclude a defendant from preventing a speedy trial in the state court by removal proceedings and then consume the time and expense and exercise of jurisdiction of the federal court by invoking by motion the courts jurisdiction to dismiss the cause and thus compel plaintiff to go upon a fool's errand.*"

Respectfully submitted,

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Serenes T. Schreiber

.....

Alfred A. Frasier

Attorneys for Appellant,
Residence: Boise, Idaho.

I hereby certify that, in my opinion as counsel herein, the grounds of the foregoing petition are well founded, and I believe the foregoing petition for a rehearing in said cause to be well founded in law and that the same is proper to be presented and filed.

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Counsel for Appellant.

Received copy and accepted service of foregoing petition for re-hearing this.....day of March, 1939.

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Attorneys for Appellee,
Residence, Boise, Idaho.